APPEAL NO. 021504
FILED ON AUGUST 1, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 14, 2002. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on April 5, 2001, as was reported by the designated doctor chosen by the Texas Workers' Compensation Commission (Commission), and that the claimant's impairment rating (IR) is 13%, as was reported by a peer review doctor who had not examined the claimant. The claimant appeals the hearing officer's determination on the IR issue, contending that the hearing officer should have given presumptive weight to the 19% IR assigned by the designated doctor. The respondent (self-insured) requests that the hearing officer's decision be affirmed. There is no appeal of the MMI determination.

DECISION

The hearing officer's decision on the IR issue is reversed and a decision is rendered that the claimant's IR is 19% as reported by the designated doctor.

The claimant sustained a compensable injury on _____. It is undisputed that the compensable injury included a cervical sprain, cervicobrachial syndrome, degeneration of the cervical intervertebral discs, and a lumbar sprain. Impairment for the lumbar region is the main point of contention. With regard to the claimant's lumbar region, the claimant's treating doctor diagnosed sciatica, facet syndrome, myofascitis, and sprain/strain. On September 26, 2000, the treating doctor reported that the claimant reached MMI on September 26, 2000, with an 8% IR. All of the IR assigned by the treating doctor was for abnormal cervical range of motion (ROM). On October 5, 2000, the treating doctor reported that the claimant reached MMI on September 26, 2000, but changed the IR to 4%.

The designated doctor chosen by the Commission reported on April 12, 2001, that the claimant reached MMI on April 5, 2001, with a 19% IR. In a narrative report, the designated doctor set forth his findings of his April 5, 2001, physical examination of the claimant. The designated doctor's cervical and lumbar ROM charts, wherein ROM measurements were recorded, were also in evidence. The designated doctor assigned the claimant impairment of 4% for a specific disorder of the cervical spine, 9% for abnormal cervical ROM, 5% for a specific disorder of the lumbar spine, and 2% for abnormal lumbar ROM. The designated doctor noted that the IR was calculated using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides), which is the appropriate edition of the AMA Guides given the date of the designated doctor's examination. *See* Section 408.124(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.1(c)(2)(A) (Rule 130.1(c)(2)(A)). The designated doctor used the Combined Values Chart (CVC) of the AMA Guides to combine the impairment values.

The self-insured's peer review doctor reviewed the designated doctor's report and the claimant's other medical records, but did not examine the claimant, and reported that the designated doctor erred in assigning 5% impairment for a specific disorder of the lumbar spine and 2% impairment for abnormal lumbar ROM. The peer review doctor recalculated the IR assigned by the designated doctor and determined that the claimant has a 13% IR composed of the impairment the designated doctor assigned for the cervical spine. The peer review doctor also reported that the claimant had reached MMI on September 26, 2000, as was reported by the treating doctor. The peer review doctor testified at the CCH.

The Commission sent the peer review doctor's report to the designated doctor. The designated doctor responded that he had examined the claimant and had done a thorough review of all of the records in the case; that the claimant had injuries to his neck and low back and had suffered with residual symptoms, including pain and dysfunction, for more than six months; and that at the time of his examination of the claimant, the claimant was still experiencing pain in those areas. The designated doctor wrote that, despite the peer review doctor's objections, he would not change the April 5, 2001, MMI date and the 19% IR.

The hearing officer found that the designated doctor erred in assigning 5% impairment for a specific disorder of the lumbar spine because the claimant had not been diagnosed with such a problem and the claimant had not claimed such an injury, and that the 2% impairment the designated doctor assigned for abnormal lumbar ROM is against the great weight of the other medical evidence. The hearing officer recalculated the IR assigned by the designated doctor to exclude the impairment assigned for the lumbar region and concluded that the claimant has a 13% IR, which is the impairment the designated doctor assigned for the cervical region. This is the same thing that the peer review doctor did to arrive at a 13% IR.

For a compensable injury that occurs before June 17, 2001, Section 408.125(e) provides that, if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors.

In Texas Workers' Compensation Commission Appeal No. 941640, decided January 13, 1995, the Appeals Panel held that the 1989 Act and Commission rules contemplate that an injured employee's IR will be based on the IR of a doctor who has examined the employee, and that it was error for the hearing officer in that case to have based the claimant's IR on the report of a doctor who did not examine the claimant. In the instant case, it appears that the hearing officer based the 13% IR on the opinion of a doctor who has not examined the claimant, because the peer review doctor was the only doctor who reported that the claimant had a 13% IR.

In Texas Workers' Commission Appeal No. 94646, decided July 5, 1994, the Appeals Panel held that a hearing officer should either find that the great weight of the other medical evidence is not contrary to the report of the designated doctor and adopt the IR of the designated doctor or not use the designated doctor's IR, and that a hearing officer should not pick and choose parts of the designated doctor's IR report. However, there have been limited circumstances where the Appeals Panel has affirmed a hearing officer's recalculation of a designated doctor's IR. For example, in Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995, a hearing officer resolved an issue of whether a ganglion cyst of the right wrist was part of the compensable injury by determining that it was not and then resolved the IR issue by excluding from the designated doctor's IR the impairment that was assigned for the right wrist, which left the impairment that was assigned for the compensable back and neck injury. The Appeals Panel noted in that decision that the case did not involve rejection by the hearing officer of a portion of the IR assigned by the designated doctor for the compensable injury, and that, since the right wrist was found not to be part of the compensable injury, it should not have been assigned any impairment and that the impairment assigned for the wrist was easily separated from the IR assigned for the compensable back and neck injury. Rule 130.6(d)(5) now provides for multiple certifications of MMI and IR from the designated doctor that take into account the various interpretations of the extent of the injury.

Another example of where recalculation of a designated doctor's IR by a hearing officer has been affirmed by the Appeals Panel is where the designated doctor has made a mathematical error in the calculation of the IR, such as an error in the use of the CVC of the AMA Guides. *See* Texas Workers' Compensation Commission Appeal No. 011597, decided September 7, 2001. The present case does not involve the assignment by the designated doctor of impairment for a noncompensable body part nor does it involve a mathematical error by the designated doctor in the calculation of the claimant's IR. Thus, the hearing officer's recalculation of the designated doctor's 19% IR to the 13% IR reported by the peer review doctor was not warranted.

The designated doctor assigned the claimant 5% impairment for a specific disorder of the lumbar spine (*See* AMA Guides, Table 49, II-B). It is undisputed that the claimant sustained a compensable lumbar sprain. Thus, contrary to the hearing officer's finding, the claimant did claim a lumbar injury. The treating doctor diagnosed the claimant as having a lumbar sprain/strain. The designated doctor reported that the claimant had a low back injury with residual symptoms, including pain and dysfunction, for more than six months, and that the claimant was still experiencing pain in that area. In Texas Workers' Compensation Commission Appeal No. 950223, decided March 30, 1995, the Appeals Panel held that a sprain or strain may be considered a soft tissue lesion and rated under Table 49, II-B. *See also* Texas Workers' Compensation Commission Appeal No. 970589, decided May 15, 1997.

The 2% impairment the designated doctor assigned for abnormal lumbar lateral ROM is shown in the designated doctor's lumbar ROM chart and is in accordance with Table 57 of the AMA Guides.

We conclude that the hearing officer erred in recalculating the designated doctor's 19% IR to arrive at the 13% IR reported by the peer review doctor, who did not examine the claimant. We reverse the hearing officer's decision on the IR issue and render a new decision that the claimant's IR is 19% as assigned by the designated doctor.

The true corporate name of the insurance carrier is **SELF INSURED** and the name and address of its registered agent for service of process is

SELF INSURED
CARRIER ADDRESS 1
CITY TEXAS ZIP.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Michael B. McShane
Appeals Judge